IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

NO. 431

CITY OF CORINTH, MISSISSIPPI,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent,

ALABAMA TENNESSEE NATURAL GAS COMPANY,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM L. SHARP
614½ Waldron Street
Corinth, Mississippi
Attorney for Petitioner

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ALABAMA-TENNESSEE NATURAL GAS COMPANY,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled cause on June 29, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 268 F2d 10, and a copy is printed as Appendix "A" hereto, *infra* pp. 17. The order of the Federal Power Commission (R. 189) which forms the basis for this action is printed in Appendix "B" hereto, infra, pp. 21.

JURISDICTION

The jurisdiction of this court is invoked under 28 U. S. C., section 1254(1). The jurisdiction of the lower court was invoked under Section 19(b) of the Natural Gas Act (52 Stat. 831; 15 U. S. C., sec. 717r).

QUESTION PRESENTED

Does a court of appeals have power of review under Section 19(b) of the Natural Gas Act of an order of the Federal Power Commission allowing pipeline company to place increased rates into effect under Section 4(d) of the Natural Gas Act, without a hearing, in violation of a fixed rate contract with customer, where customer has timely challenged the jurisdiction of Commission to permit such increase?

STATUTES AND REGULATIONS INVOLVED

52 Stat. 822; 15 USC, § 717c
52 Stat. 831; 15 USC, § 717r
52 Stat. 833; 15 USC, § 717t

STATEMENT OF THE CASE

Alabama-Tennessee Natural Gas Company (Alabama-Tennessee) operates a pipeline from which it delivers gas to petitioner and other retail distributors and industries. Alabama-Tennessee purchases its gas from Tennessee Gas Transmission Company. Petitioner owns and operates a gas distribution system, and all of its gas is purchased from Alabama-Tennessee.

On December 23, 1950, petitioner entered into a service agreement with Alabama-Tennessee for the sale and purchase of gas. New contracts have been executed from time to time to increase the quantity of gas petitioner was allowed to use, but the pricing provision (Appendix "C", *infra.*, pp. 26) remained the same. In March, 1954, new and increased rates were put into effect by agreement of the parties, but petitioner has not agreed to any subsequent rate changes.

The first two paragraphs of the pricing provision of the service agreement (R. 93) are similar to the provisions found in many service agreements, and which was considered by the court in *Memphis Light, Gas and Water Division v Federal Power Commission*, 358 US 103, 79 S Ct 194, 3 L Ed(2d) 153. The third paragraph, however, provides that Alabama-Tennessee "may file with the Federal Power Commission, or other body having jurisdiction, for a change in rates and charges effective as to Buyer, in accordance with the following subparagraphs." (R. 93-94) The sub-paragraph mentioned provides for an increase in the *commodity* where Alabama-Tennessee's *average* cost of gas exceeds the *average* price paid during the calendar year of the effective

date of the rate schedule, or when Alabama-Tennessee was required to pay certain additional taxes specified in the agreement.

On January 14, 1957, Alabama-Tennessee filed an application with the Federal Power Commission for an increase in both its demand and commodities rate to its customers, including petitioner. (R. 107-162) The application did not contain any data from which it could be determined whether there had been any increase in Alabama-Tennessee's average cost of gas over the average price paid during the calendar year of the effective date of the rate schedule, (1954), or whether it was required to pay any of the additional taxes mentioned in the contract. In fact, the application stated that the increase was to take care of increases Alabama-Tennessee *expected* to get from its supplier. (R. 114).

On February 13, 1957, the Commission ordered the question of the reasonableness of the rate be set for hearing pursuant to Section 4(e) of the Natural Gas Act, and suspended the increase for five months, or until July 14, 1957. (R. 189). On motion of Alabama-Tennessee (R. 192) the Commission entered an order on July 18, 1957, placing the rates into effect, without a hearing, subject to refund. (R. 197). This is the order in controversy. Within the statutory time petitioner filed an application for rehearing of the Commission's order, contending that it had a fixed rate contract, subject to the contract provision pertaining to increase in average cost of gas and additional taxes, and that the Commission had no jurisdiction to permit the rate increase. (R. 1-9, 207-211).

The Commission took no action on the challenge to its jurisdiction within the thirty days after it was filed, but on September 18, 1958, the Commission's secretary rejected petitioner's application for rehearing on the grounds that Corinth was not a party to the proceeding, and that the order was not a final order, but an interim order in the proceeding. (R. 212).

On petition to the United States Court of Appeals for the Fifth Circuit for review of the Commission's order allowing the increased rates to go into effect, the court rejected the contention of the Commission and Alabama-Tennessee that petitioner was not a "party to a proceeding . . . . aggrieved by an order issued by the Commission" under Section 19(b) of the Natural Gas Act. (R. 225) However, the court held that the order of the Commission was "interlocutory, procedural and ministerial" and that the court did not have jurisdiction to hear the petition for review until the grounds asserted by petitioner had been passed on by the Commission. The merits were not considered and the petition dismissed. (R. 225). No motion to dismiss the petition for review was made by the Commission or by Alabama-Tennessee.

It is the position of petitioner that it has a fixed price contract with Alabama-Tennessee, except under the specific conditions set out in the contract, and that the Federal Power Commission does not have jurisdiction to permit Alabama-Tennessee to increase its rates under the circumstances, and that when the Commission entered its order permitting the increased rates to go into effect, the petitioner was required to pay the increased rates, the order of the Commission was subject to review under Section 19(b) of the Natural Gas Act.

It is further the contention of petitioner that the order of the Commission imposed an obligation upon petitioner to pay the increased rates for an indeterminate period of time,[1] and that no further administrative action on the part of the Commission is required to put the increased rates into effect. Therefore, the order of the Commission is reviewable by the Court of Appeals.

REASONS FOR GRANTING WRIT

I.

THE OPINION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT ON THE SAME MATTER OF FEDERAL LAW.

The decision of the court below in the instant case holding that it did not have jurisdiction to decide this case is directly and irreconcilably in conflict with the decision of the United States Court of Appeals for the Tenth Circuit, in *Cities Service Gas Company v Federal Power Commission*, 10 Cir., 1958, 255 F 2d 850, cert. den., 358 US 837, 3 L Ed 2d 73. The cases of the Fifth Circuit and the Tenth Circuit involve identical questions of federal law under parallel circumstances, i.e., whether Section 19(b) of the Natural Gas Act confers jurisdiction upon a United States Court of Appeals to review such action of the Federal Power Commission with respect to the filing of increased gas rate schedules and permitted

[1] Petitioner has been paying an increased rate on a similar order in another case before the Commission (Docket G-5471) since December 15, 1954, and no hearing has been held or appears imminent.

The Tenth Circuit held that it did have such jurisdiction. to go into effect under Section 4 of the Natural Gas Act.

In *Cities Service Gas Company v Federal Power Commission*, supra, Magnolia Petroleum Company, supplier of natural gas to Cities Service Gas Company, tendered increased rate schedules to the Commission for filing, and were accepted and put into effect by the Commission. Cities Service sought review of this action of the Commission in the Circuit Court of Appeals for the Tenth Circuit. The respondent Commission answered that the acceptance of a rate schedule for filing was merely procedural and interlocutory and not subject to review. Magnolia contended that Cities Service had not exhausted the administrative remedies. The Court of Appeals held that it had jurisdiction to review the order of the Commission allowing the increased rate to be filed, and in so holding reviewed the rule announced in *Phillips Petroleum Company v Federal Power Commission*, 10 Cir., 1955, 227 F 2d 470, cert. den., *Michigan-Wisconsin Pipeline Company v Phillips Petroleum Company*, 350 US 1005, 76 S Ct 649, 100 L Ed 868, that "Section 19(b) of the Natural Gas Act does not by its terms limit the review of orders of the Commission to those that are final in form and substance"; and, to the rule announced in *Federal Power Commission v Metropolitan Edison Company*, 304 US 375, 58 S Ct 963, 82 L Ed 1408, that "the provisions for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." In commenting on these rules, the court said:

"Such language must be read in relation to the facts of the case and, so limited, does not establish an inflexible standard requiring a conventional hearing and resulting in findings supported by evidence as a condition to review. *Otherwise, the procedure for review could be successfully circumvented by a refusal to act upon a statutory granted right.* Pacific Power & Light Co. v. United States, 316 U. S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563. The order of the agency is final for purposes of review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process, Isbrandtsen Co. v. United States, 93 U. S. App. D. C. 293, 211 F. 2d 51, certiorari denied Japan-Atlantic and Gulf Conference v. United States, 347 U. S. 990, 74 S. Ct. 852, 98 L. Ed. 1124 and cases cited therein. (Emphasis added)

"The present case is comparable to that considered by us in Phillips, supra, (227 F. 2d 475) wherein we stated:

"'The orders sought to be reviewed here do not deal with the merits of the proceedings before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to change Michigan on June 7, 1954 and thereafter until changed by order of the Commission pursuant to hearing.'"

* * * * * * * * *

"The question of whether or not petitioner has fully exhausted its administrative remedies is partially resolved by our determination that the order of the Commission was a final order and by peti-

tioner's efforts to have the order changed by its protest and petition for rehearing. Petitioner was not obligated to undertake the burden of persuading the Commission to take action to invalidate the rate as unreasonable or detrimental to the public interest in accordance with Section 5."

The instant case presents an identical situation. Alabama-Tennessee tendered for filing increased rate schedules which were accepted and put into effect by the Commission. Petitioner applied to the Commission for a rehearing of this order, contending that petitioner had a fixed rate contract with Alabama-Tennessee and that the Commission had no authority to permit the increased rate. The Commission did not act upon the application for rehearing within thirty days after it was filed, and therefore, the application was deemed to have been denied under Section 19(a) of the Natural Gas Act. Petitioner sought review of the Commission action in the United States Court of Appeals for the Fifth Circuit. The court dismissed the petition for review of the Commission action in the United States Court of Appeals for the Fifth Circuit. The court dismissed the petition for review, holding that the Commission's order permitting the rates to go into effect was "interlocutory, procedural, and ministerial" and that the grounds asserted by petitioner "should first be considered and passed on by the Commission." The court cited the reasons given in *Humble Oil & Refining Company v Federal Power Commission*, 5 Cir., 1956, 236 F 2d 819, cert. den. 352 US 967, 77 S Ct 354, 1 L Ed 2d 321 as the basis for its decision in the present case.

In *Humble Oil & Refining Company v Federal Power Commission*, supra, petitioner filed increased rate sched-

ules with the Commission, and following its usual procedure, the Commission suspended the increased rates for five months under Section 4(e) of the Natural Gas Act. On petition to Court of Appeals for the Fifth Circuit for review of the Commission's order the court held, in a 3-1 decision, that the order was not reviewable because "it is a mere procedural step taken at the inception of and not upon the completion of the administrative process." (236 F 2d 823). The court pointed out that the order "had but one objective in view, to maintain the status quo between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increases." (236 F 2d 823).

In this conflict of decisions a litigant is severely penalized if it cannot file its petition for review in the Circuit Court of Appeals for the Tenth Circuit where its case would be heard and decided, whereas, it would be denied access to the court for judicial review on identical facts in the Fifth Circuit. The petitioner herein is left in a position of being forced to submit to an order of the Commission believed to be illegal, or resorting to open defiance of the Commission order. The possibility of the latter situation prompted Judge Brown to state: "It is doubtful that government (administrators) should ever be permitted, in insulating their actions from judicial review, to assert that the citizen must run the bold course of defiance as a means of testing legality."

We respectfully submit that the conflict in decisions between the Fifth Circuit and Tenth Circuit should be resolved by this court.

II.

THE JUDGMENT OF THE COURT OF APPEALS IS PREDICATED UPON A MISCONSTRUCTION OF IMPORTANT QUESTIONS OF FEDERAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The decision of the Court of Appeals constitutes an unwarranted expansion of the principals announced by this court in *United States v Los Angeles & S L Railroad Co.*, 273 US 299, 47 S Ct 413, 71 L Ed 651; *Columbia Broadcasting System, Inc. v United States*, 316 US 407, 62 S Ct 1194, 86 L Ed 1563; *Frozen Foods Express v United States*, 351 US 40, 76 S Ct 569, 100 L Ed 910; *United States v Storer Broadcasting Co.*, 351 US 192, 76 S Ct 763, 100 L Ed 1081 to the effect that when a determination by an administrative agency has an immediate and practical impact upon the subject of the action, the order of the agency is reviewable. The Fifth Circuit added the requirement that a hearing before the administrative agency is essential to give "finality" to the agency action or order.

The order of the Commission sought to be reviewed here has an immediate and practical impact upon petitioner, because the order requires petitioner to pay increased rates for gas from July 14, 1957, the effective date of the order. The Commission order does not "maintain the status quo between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increase."[2] If petitioner does not change its status and

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[2] *Humble Oil and Refining Company v Federal Power Commission*, supra.

pay the increased rates in accordance with the order, it is subject to the severe penalties prescribed by Section 21 of the Natural Gas Act. Petitioner contends that the Commission is without authority to permit the increased rates to go into effect because of petitioner's fixed rate contract with Alabama-Tennessee. Therefore, an inquiry into the reasonableness of the rates would not be material, and petitioner should not be forced to bear the burden of a hearing on the reasonableness of rates where the only matter under consideration was purely a question of law involving the construction of a contract. This precise point was placed squarely before the Commission in petitioner's application for rehearing before the Commission. The election not to have a hearing was that of the Commission.

The order of the Commission establishes with finality the new and increased rate which petitioner must pay for gas on July 14, 1957, and thereafter until changed by a subsequent order of the Commission. This can and often does amount to absolute finality.[3]

The Fifth Circuit Court of Appeals is inconsistent in its determination of what orders of the Commission are reviewable. In *Sun Oil Company v Federal Power Commission*, 5 Cir., 1959, 266 F 2d 222, Sun Oil Company (Sun) and Southern Natural Gas Company (Southern) had a contract for the purchase and sale of natural gas to remain in effect for ten years from September 3, 1947. Subsequent to the decision in the Phillips Petroleum case[4] on June 7, 1954, the Commission required Sun to

[3] See note 1, page 6, supra.
[4] *Phillips Petroleum Company v Wisconsin*, 347 US 672, 74 S Ct 794, 98 L Ed 1053.

obtain a certificate of public convenience and necessity authorizing the sale of natural gas to Southern. Sun also filed its contract as a rate schedule under Section 4 of the Natural Gas Act. Before the agreement between Sun and Southern expired in 1957, a new agreement was made which was to become effective upon the expiration of the 1947 agreement and provided for a considerable increase in the cost of gas. The contract was substantially the same as the 1947 agreement and provided for continued deliveries of gas from the same field and with the same facilities. Sun then applied to the Commission, under the new contract, for a new certificate of public convenience and necessity and filed its new contract as an initial rate schedule. The Commission rejected the application on the ground that the new certificate would merely duplicate the earlier certificate and that the proposed rate filings were rate changes rather than initial rate filings. Sun then resubmitted the 1957 contract as a rate change. The Commission then suspended the effectiveness of the rate change for the statutory period of five months. Petitioner Sun sought review of the action of the Commission and contended that the orders sought to be reviewed were interlocutory and that the administrative remedies had not been exhausted. In holding that the orders were reviewable, the court said:

> "We see no need for the holding of a formal hearing and the taking of testimony where no fact issue was presented. Although the orders before us are, in a sense, procedural and interlocutory, they make a final disposition of questions of grave importance in the natural gas industry. *The orders were formal determinations of rights of the petitioners, and the effect of the orders were not contingent upon future*

administrative action. We have no doubt that these orders should be passed upon by this court." (Emphasis added)

In the instant case the question presented to the Commission and to the court was the simple question of law whether Corinth had a fixed rate contract with Alabama-Tennessee and a formal hearing and taking of testimony would have added nothing, since no fact issue was presented. The order of the Commission was a formal determination of the right of the parties, i.e., that the Commission had authority to grant the rate increase, and the order permitted the increase to go into effect without any further administrative action. The order should have been reviewed by the court.

III.

THE JUDGMENT BELOW WILL CAUSE IRREPARABLE DAMAGE TO PETITIONER; DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS; AND HAS AN INJURIOUS IMPACT ON THE GAS INDUSTRY.

The primary aim of the Natural Gas Act is to protect the consumer against exploitation at the hands of the natural gas companies.[5] Such protection is not afforded when a pipeline company (Alabama-Tennessee) can flagrantly violate its contractual obligation (a fixed rate contract) with the sanction and assistance of an administrative agency (F. P. C.), and the aggrieved party (petitioner) has no recourse to the courts for protection. In effect, petitioner is being forced, with the help of the

[5] *Federal Power Company v Hope Natural Gas Co.*, 64 S Ct 281, 320 US 591, 88 L Ed 333.

Commission, to lend large sums of money to Alabama-Tennessee by way of increased charges for gas. At the present time petitioner is being forced to pay increased rates in three[6] cases, all of which petitioner believes to be illegal.

Petitioner has no means of compelling the Commission to decide this all important jurisdictional question. If the lower court is correct in its theory that a hearing by the Commission is a prerequisite to judicial review, then petitioner is confronted with the dismal prospect of new rate increases from time to time, in violation of its contract, with no opportunity for the protection of judicial review of the action (or inaction) of the Commission.

If the Commission cannot make a decision over 4½ years in Docket G-5471, an indefinite period of time, if ever, may elapse before such a hearing, with the petitioner continuing to pay increased rates it believes to be illegal. This intolerable situation serves to deprive petitioner of its property without due process of law.

The Commission takes the position that if the increase is not allowed, petitioner will be entitled to a refund of the sums paid. This course does not restore to petitioner the residential space-heating and industrial customers that are lost to competitive fuels by the imposition of the unlawful increases.

There is a tendency today toward a lenient view of the laxity in administrative procedures, and the courts are hesitant to intervene until all administrative remedies have been exhausted. However, this modern tendency

[6]Docket G-5471, effective December 15, 1954; Docket G-11,982, effective July 15, 1957; Docket G-17,218, effective May 14, 1959.

should never become a shield for administrative tyranny. In the recent decision of *Iowa-Illinois Gas and Electric Co. v City of Ft. Dodge,* (Iowa, 1957) 85 NW 2d 28, Mr. Justice Larson stated the matter simply and eloquently:

> "* * * without doubt the law cannot be said to be static. It grows and changes. No court should be concerned with whether it is 'modern' but with whether it is right. There are such things as eternal virtues and ultimate truths, particularly in the field of constitutional law. The constitution guarantee against legislative confiscation and against the taking of private property without due process should and do mean the same in the year 1957 as they meant in the year 1909."

Undoubtedly there are many gas distribution systems with a fixed rate contract similar to that of petitioner, who are likewise suffering the penalty of administrative inaction, and who are denied relief through the courts.

CONCLUSION

Because of the direct conflict between courts of appeals on important matters of federal law, and because of a serious misapplication of principles of law by the court of appeals, and because of the serious and confiscatory effect on petitioner, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. SHARP
714½ Waldron Street
Corinth, Mississippi

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16956

CITY OF CORINTH, MISSISSIPPI,

PETITIONER,

versus

FEDERAL POWER COMMISSION,

RESPONDENT.

(June 29, 1959)

Before JONES, BROWN and WISDOM, Circuit Judges.

JONES, Circuit Judge: Alabama-Tennessee Natural Gas Company purchases natural gas from Tennessee Gas Transmission Company. Alabama-Tennessee operates a pipeline from which it delivers gas to industries and to retail distributors. Among the latter is the petitioner, the City of Corinth, Mississippi. A service agreement between Alabama-Tennessee and the City was executed un-

der the Federal Power Commission's Order No. 144, 18 C.F.R. Sec. 154.1 et seq. Among the provisions of the agreement were the following:

> "1. Rates to be paid for natural gas delivered hereunder are subject to the jurisdiction of the Federal Power Commission and shall be those contained in Rate Schedule G-1 on file with the Federal Power Commission and lawfully in effect from time to time pursuant to the provisions of the Natural Gas Act."
>
> "2. This agreement in all respects shall be and remain subject to the provisions of the applicable Rate Schedules and General Terms and Conditions attached to the rate schedules filed with the Federal Power Commission, all of which are by reference made a part hereof."

In January 1957 Alabama-Tennessee filed, pursuant to Section 4(d) of the Natural Gas Act, 15 U.S.C.A. Sec. 717c(d), an increase in the rates contained in its Rate Schedule G-1. The Commission requested comments on this filing from the customers of Alabama-Tennessee, including the City, on January 14, 1957. The City replied in a letter dated January 25, 1957, informally, protesting the rate increase on the grounds that it had not been shown to be reasonable and requested that the Commission suspend the increase and set the matter for hearing. On February 13, 1957, the Commission ordered the question of the reasonableness of Alabama-Tennessee's increased rate be set for hearing pursuant to Section 4(e) of the Act, 15 U.S.C.A. Sec. 717c(e), and suspended the increase for the maximum period of five months, or until July 14, 1957.

At the conclusion of the five-month suspension period,

Alabama-Tennessee moved to place the rate in effect subject to refund, pursuant to Section 4(e) of the Act. The Commission granted Alabama-Tennessee's motion by an order issued July 18, 1957. On August 19, 1957, the City attempted to file an application for rehearing of the Commission's order placing the increase rate in effect subject to refund, contending in its application that the Commission had no jurisdiction to accept the rate increase for filing. The Commission's Secretary rejected the application for rehearing on the ground that the City was not a party to the proceeding and not entitled to apply for rehearing. The Secretary's letter also stated that "the order to which your application is addressed is not a final order, but an interim order in this proceeding." The City has not at any time intervened in the proceedings before the Commission. It brings a petition for review seeking to have set aside the Commission's order placing the increased rates in effect subject to refund. Alabama-Tennessee has intervened. The City asserts that it has a fixed price contract and the Commission cannot authorize increases, founding its assertion upon the doctrine of *United Gas Pipe Line Co. v Mobile Gas Service Corp.*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348, 76 S. Ct. 368, 100 L. Ed. 388, motion to amend opinion den. 351 U. S. 946, 76 S. Ct. 843, 100 L. Ed. 1471, and *Memphis Light, Gas and Water Division v. Federal Power Commission*, 102 App. D.C. 77, 250 F. 2d 402. The petition for review and briefs were filed prior to the decision of the Supreme Court in *United Gas Pipe Line Company v. Memphis Light, Gas and Water Division*, 358 U. S. 103, 79 S. Ct 194, 3 L. Ed. 2d 153, reh. den. 358 U. S. 942, 79 S. Ct. 344, 3 L. Ed. 2d 350.

The Commission and Alabama-Tennessee urge that the petition must be dismissed because the City of Corinth, not having intervened, is not a "party to a proceeding * * * aggrieved by an order issued by the Commission" under Section 19(b) of the Act, 15 U.S.C.A. Sec. 717r(b) and hence is not entitled to petition for review. The City insists that it is aggrieved and that the Commission has waived the necessity, if any there be, for formal intervention. No motion to dismiss the petition for review has been made upon this or upon any other ground. We do not think there is any jurisdictional necessity that we dismiss upon this ground sua sponte. Since the City was invited by the Commission to express its views we think it proper that we decline to say that it is not a party aggrieved.

The Commission contends and Alabama-Tennessee joins in urging that the order which the City asks us to review is interlocutory, procedural and ministerial and that the grounds here asserted should first be considered and passed upon by the Commission. We agree that this is so. We are without jurisdiction. The reasons have been adequately stated in earlier decisions and need not be here repeated. See *Humble Oil & Refining Co. v Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 819, cert. den. 352 U. S. 967, 77 S. Ct. 354, 1 L. Ed. 2d 321.

The merits are not reached. The petition for review is

DISMISSED.

APPENDIX B

ORDER MAKING EFFECTIVE PROPOSED TARRIF CHANGES UPON FILING OF UNDERTAKING TO ASSURE REFUND OF EXCESS CHARGES.

(Issued July 18, 1957.)
United States of America.
Federal Power Commission.

Before Commissioners: Frederick Stueck, Acting Chairman; Seaborn L. Digby and William R. Connole.

In the Matter of:

Alabama-Tennessee Natural Gas Company.

Docket No. G-11982.

Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), on January 14, 1957, tendered for filing Third Revised Sheet No. 5 and Second Revised Sheet No. 10 to its FPC Gas Tariff, First Revised Volume No. 1, proposed to become effective on February 14, 1957, and providing increased rates and charges for sales by Alabama-Tennessee in interstate commerce of natural gas for resale for ultimate public consumption, subject to the jurisdiction of the Commission.

Pursuant to the authority contained in Sections 4, 5, 15 and 16 of the Natural Gas Act, the Commission, by order issued February 13, 1957, entered upon a hearing concerning the lawfulness of the rates, charges, classifications and services of Alabama-Tennessee's FPC Gas

Tariff, First Revised Volume 1, as amended by the aforesaid revised tariff sheets, and pending such hearing and decision thereon, suspended and deferred the use of the proposed tariff changes until July 14, 1957, and until such further time thereafter as such changes might be made effective in the manner prescribed by the Natural Gas Act.

The proceeding instituted for the purpose of determining the lawfulness of the increased rates and charges embodied in the aforesaid proposed tariff changes filed on January 14, 1957, has not been concluded, nor a decision rendered therein.

Alabama-Tennessee, on July 1, 1957, in accordance with the provisions of the Natural Gas Act—particularly Section 4(e) thereof—filed in this proceeding a motion requesting that the aforesaid revised tariff sheets be made effective as of July 14, 1957.

The Commission finds:

It is appropriate and necessary in carrying out the provisions of the Natural Gas Act to require Alabama-Tennessee to file an undertaking as hereinafter ordered and conditioned.

The Commission orders:

(A) Upon execution by Alabama-Tennessee of the agreement and undertaking described in paragraph (C) below and acceptance thereof, evidenced by a letter addressed to Alabama-Tennessee by the Secretary of the Commission, the rates, charges, classifications, and serv-

ices set forth in Third Revised Sheet No. 5 and Second Revised Sheet No. 10 to Alabama-Tennessee's FPC Gas Tariff, First Revised Volume No. 1, shall be effective as of July 14, 1957, subject to further orders of the Commission in this proceeding.

(B) Alabama-Tennessee shall refund at such times and in such amounts to persons entitled thereto, and in such manner as may be required by final order of the Commission, the portion of the increased rates and charges found by the Commission in this proceeding not justified, together with interest thereon at the rate of 6 per cent per annum from the date of payment to Alabama-Tennessee until refunded; shall bear all costs of any such refunding; shall keep accurate accounts in detail of all amounts received by reason of the increased rates or charges effective as of July 14, 1957, for each billing period, specifying by whom and in whose behalf such amounts were paid; and shall report (original and four copies), in writing and under oath, to the Commission monthly, for each billing period, and for each purchaser, the billing determinants of natural gas sales to such purchasers and the revenues resulting therefrom as computed under the rates in effect immediately prior to July 14, 1957, and under rates and charges allowed by this order to become effective, together with the differences in the revenues so computed.

(C) As a condition of this order, within 15 days from the date of issuance hereof, Alabama-Tennessee shall execute and file with the Secretary of this Commission its written agreement and undertaking to comply with the terms of paragraph (B) hereof, signed by a responsible officer of the corporation, evidenced by proper au-

thority from the Board of Directors, and accompanied by a certificate showing service of copies thereof upon all purchasers under the rate schedules involved, as follows:

Agreement and Undertaking of Alabama-Tennessee Natural Gas Company to Comply with the Terms and Conditions of Paragraph (B) of Federal Power Commission's Order Making Effective Proposed Tariff Changes.

In conformity with the the requirements of the order issued ....., 1957, in Docket No. G-11982, Alabama-Tennessee Natural Gas Company hereby agrees and undertakes to comply with the terms and conditions of paragraph (B) of said order, and has caused this agreement and undertaking to be executed and sealed in its name by its officers, thereupon duly authorized in accordance with the terms of the resolution of its Board of Directors, a certified copy of which is appended hereto this .....day of. ....., 1957.

ALABAMA-TENNESSEE NATURAL GAS COMPANY,

By.....

Attest:

.....

Secretary.

(D) If Alabama-Tennessee shall, in conformity with the terms and conditions of paragraph (B) of this order, make the refunds as may be required by order of the

Commission, the undertaking shall be discharged, otherwise it shall remain in full force and effect.

By the Commission.

J. H. GUTRIDE,
(Joseph H. Gutride),
Secretary.

APPENDIX C

ARTICLE V

Prices and Rate Schedules

1. The rates to be paid for natural gas delivered hereunder are subject to the jurisdiction of the Federal Power Commission and shall be those contained in Rate Schedule *G*-1 on file with the Federal Power Commission and lawfully in effect from time to time pursuant to the provisions of the Natural Gas Act.

2. This agreement in all respects shall be and remain subject to the provisions of the applicable Rate Schedules and General Terms and Conditions attached to the rate schedules filed with the Federal Power Commission, all of which are by reference made a part hereof.

3. Seller may file with the Federal Power Commission, or other body having jurisdiction, for a change in the rates and charges effective as to Buyer, in accordance with the following sub-paragraphs; provided, however, that should it hereafter become unnecessary for Seller so to file, Seller shall have the right to increase the rates and charges effective as to Buyer to provide that:

(a) One-half cent increase or decrease, as the case may be, in the commodity charge for each full one-half cent per MCF that the average cost of gas purchased by Seller shall exceed or shall be less than the average purchase price paid by Seller for gas during the calendar year of the effective date of the Rate Schedule specified in Section 1 of this Article V.

(b) Adjustment of the commodity charge in an amount equal to the amount of any present or future sales tax levied by the United States, or by the States of Alabama, Mississippi or Tennessee, or any political subdivision thereof, on, or in respect of, applicable to, or measured by deliveries of natural gas hereunder to Buyer, if and to the extent any such sales tax shall be actually paid by Seller and in an amount equal to three-fourths of any additional tax, (as additional tax is defined in the next sentence hereof) which Seller shall be required to pay. The term "additional tax" shall mean collectively any sales, transaction, occupation, service, production, severance, gathering, transmission, export excise tax, assessment, fee, or other exaction hereafter levied, assessed or fixed by the United States or any state or other governmental authority, and any tax, assessment, exaction, or fee of similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise, or general property taxes, or any sales taxes levied on, in respect of, applicable to, or measured by sales of natural gas under this contract) in addition to or greater than those, if any being levied, assessed or fixed at the date of this contract on, measured by, in respect of or applicable to the natural gas to be delivered by Seller to Buyer under this contract, and which Seller may be liable for during any month either directly or indirectly through any obligation of Seller to reimburse others.

APPENDIX D

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

Section 4.(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with

all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period

than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (52 Stat. 822 (1938); 15 U. S. C. Sec. 717c)

REHEARING; COURT REVIEW OF ORDERS

Sec. 19(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of

was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which it supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347.)

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's

order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commissioner's order. (52 Stat. 831 (1938); 15 U. S. C. Sec. 717r)

GENERAL PENALTIES

Sec. 21 (a) Any person who wilfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who wilfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or wilfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who wilfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. (52 Stat. 833 (1938); 15 U. S. C. Sec. 717t)

APPENDIX E

JUDGMENT

Extract from the Minutes of June 29, 1959

CITY OF CORINTH, MISSISSIPPI

No. 16956 versus

FEDERAL POWER COMMISSION

This cause came on to be heard on the petition of City of Corinth, Mississippi, for review of an order of the Federal Power Commission issued on July 18, 1957 in Docket No. G-11982, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and it is hereby, Dismissed.